BOOK REVIEWS

COLLECTED LEGAL PAPERS. By Oliver Wendell Holmes. Harcourt, Brace & Howe, 1920, pp. 316.

The author of this book is so well known that the mere mention of his name is an all-sufficient reminder of his untiring and varied services as editor, author, teacher, historian, jurist and judge. The manner and generosity of his performances, in discharging the debt to the profession which both Coke and Bacon laid upon each of its members, have been such as to make him our general creditor for his assumption of our debts. The character and value of his edition of Kent's Commentaries will become all the more apparent when the Centenary of Kent's labors is celebrated a few years hence by the American Bar Association. His monumental book "The Common Law" stands and will stand for all time as one of the lighthouses of Jurisprudence. His contributions to the Harvard Law Review shine as particular stars in the constellated mass. His lectures to law students are among the most precious memories of his pupils. His historic expeditions into our *terra incognita*, like Stanley's Dark Continent, have been the despair as well as the incentive of many lesser explorers. The breadth of his juristic knowledge has sustained many of his most important judicial utterances. The sparkle of his style has revealed the beauties as well as the depth of many hidden caves of learning.

This collection consists of papers or parts of papers hitherto widely dispersed, in which views of law and life have not been elsewhere so fully expressed by the author. In the preface he modestly refers to them as "little fragments of my fleece that I have left upon the hedges of life." Examination proves that the fleece was golden, and the regions in which the fragments were found indicate the enterprise and daring of our Jason.

The papers are twenty-eight in number, arranged in the order of their date, which disturbs their continuity of subject or of treatment. Their full force and effect, however, can be gathered by a rearrangement and classification under three main heads—*Legal Essays*, under the topics of Early English Equity; Agency, in two parts; Privilege, Malice and Intent, and Executors; *Addresses to Law Students*, under the headings of The Law, The Profession of the Law, The Use of Law Schools, The Bar as a Profession, The Path of the Law, Legal Interpretation, Law in Science and Science in Law, Address at Northwestern University Law School, and Law and the Court; *Miscellaneous* or *Occasional Utterances*, in which estimates are given of the characters and works of Montesquieu, Professor Maitland, W. S. Holdsworth, the Historian of English Law, John Marshall, and Bracton, interspersed with Economic Elements, Ideals and Doubts, and an Introduction to Continental Legal Historical Series.

The paper on Early English Equity is devoted to a demonstration of the part which Equity has played in the development of English law. Agreeing with Mr. Adams that the most important contribution of the Chancery has been its procedure, which was confessedly that of the Canon law, the author controverts the error that its substantive law is merely the product of the procedure. With this object in view he proceeds to a discussion of *Uses*, which he considers the greatest contribution to the substantive law which has ever been credited to Chancery. He contends that the feoffee to uses of early English

law corresponds point by point to the salman or executor of the early German law as described by Beseler fifty years ago, and step by step, following the development of the office and obligations of an executor to observe the will of a testator, and the absence of appropriate remedies at common law by which a cestui que use could enforce his rights, he reaches the conclusion that the doctrine of uses rested on the *fides*, or trust reposed and the obligation of good faith, and that circumstance remains as a mark of Teutonic origin as well as of the ecclesiastical origin of the jurisdiction. This is of importance because it shows a source of jurisdiction antedating the influx of the civil law into England, and connecting the common notion of lawyers that the law of trusts sprang entirely from the law of Rome. The doctrine of uses was not the reaction of the remedy by subpoena, although the form of remedy reacted powerfully upon the conception of the right. Then, through the identification of substantive and remedial rights, a use came to be regarded as a right to a subpoena, losing the character of a *jus in rem*, and passing into the category of choses in action. Under the head of Contract, he disputes the common notion that the Common Law borrowed the doctrine of consideration from the Chancery. The Chancery, having become a separate Court, asserted a power of which it had been shorn as an ecclesiastical tribunal by giving a remedy for contracts for which the common law courts of the King afforded none, thus retaining some relics of ancient custom which had been dropped by the Common Law, but had been kept alive by the Church.

In the two papers upon *Agency*, the thesis is that the present law of agency has been caused by the survival of ancient doctrines of the rights and liabilities of heads of families based on substantive grounds which have long since disappeared, but that in modern days these doctrines have been generalized into a fiction, which, while largely formal, has reacted on the law, the fiction being that within the scope of the agency, principal and agent are one. In a narrower sense, the law of agency presents but a special application of the law of master and servant, but in the early law of England, in every branch of the subject—tort, contract, possession, ratification—the fiction survived. As time went on the liability of the principal or master was not confined to family relations, but was worked out in terms of master and servant on analogies suggested by the earlier relationship.

In the second part of the paper, the history of agency as applied to contract is elaborately traced. The value of the paper consists not so largely in the conclusions reached, which the author candidly admits may be disputable, but in the demonstration that the study of legal history is the surest means of reaching an understanding of the present doctrines of the law, disclosing their origin, and in part explaining their anomalies.

In the paper on Privilege, Malice and Intent, the broad field of Torts is entered, illustrated by questions of policy, economic interferences, combinations as to rates, boycotts, and the like, considered from the broad viewpoint of temporal damage, whether foreseen or actually intended, or negligently disregarded as to consequences.

In the paper on Executors, the present fiduciary character of the office is traced through various stages of development into the modern doctrine, and the gradual displacement of heirs from their primary responsibility for the debts of the deceased is shown. The paper should be read in connection with the one on Early English Equity.

In the Addresses to Law Students there is a splendid uplift in the book. The effect of a continuous reading of them, is not so much a settlement of disputed questions, or the provocation of discussion, as to breathe into the reader the catching enthusiasm of the author in urging upon students the pursuit of "the anatomy of legal ideas as marked out by the English school of jurisprudence," and "the embryology of the same conceptions" to be found in the works of German students of the subject. "Happiness * * * cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food besides success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable purpose, a hint of the universal law."

The remaining papers, biographical, analytical, historical, philosophic are permeated by the same spirit. The law, its universality, its sublimity, its infinity—these are themes dwelt on with enthusiasm and faith. The law —"it is all a symbol, if you like, but so is the flag. The flag is but a bit of bunting to one who insists on prose. Yet, thanks to Marshall and to the men of his generation—and for this above all we celebrate him and them—its red is our life blood, its stars our world, it sblue our heaven. It owns our land. At will it throws away our lives."

The great names in the law—*Montesquieu*, "one of the high priests of thought," "a precursor of political economy," "the precursor of Beccaria in the criminal law;" "the precursor of Burke when Burke seems a hundred years ahead of his time," the man whose book had "a dazzling success at the moment, and since then probably has done as much to remodel the world as any product of the eighteenth century;" *Bracton*, the mightiest name in English law prior to Coke, whose monumental work is now in the editorial hands of Professor Woodbine of Yale, generously backed and splendidly equipped for the task; *Maitland*, the incomparable scholar and writer, whom "one is almost ashamed to praise (as) a dead master for what he did in a field where he was acknowledged to be supreme:" *Holdsworth*, whose history of English Law is to be recommended equally "To philosophers who can understand it and to practical students of the law;" and *John Marshall*, "a great ganglion in the nerves of society, or, to vary the figure, a strategic point in the campaign of history, and part of his greatness consists in his being *there*," whose success "marks the fact that all thought is social, is on its way to action; that, to borrow the expression of a French writer, every idea tends to become first a catechism and then a code;" these names serve to supply the opportunities to the author of sketching in striking outlines certain crises in legal development, and of presenting expressive portraits of the main actors in legal work, whose relationship to practical affairs is too little known, and so often neglected.

Let not the busy lawyer, immersed in the affairs of the court room and the office, cast this book aside with the remark that it differs so much from a volume of reports that he cannot cite it as authority upon the point of a case. It will open his eyes, if he have insight, to the true relationship of many ideas with which he has had but a speaking acquaintance, but which he never suspected to be of

the same lineage. Let not the student imagine it to be so recondite as to discourage the perseverance requisite for its mastery.

To both practical lawyer and student it will be found to possess value, for, above all else, its unquenchable spirit will inspire and refresh all real lovers of the law.

Hampton L. Carson.

THE PROJECT OF A PERMANENT COURT OF INTERNATIONAL JUSTICE AND RESOLUTIONS OF THE ADVISORY COMMITTEE OF JURISTS. Report and Commentary by James Brown Scott. Published by the Carnegie Endowment for Interantional Peace, Washington, 1920, pp. 235.

This little book takes the form of a letter to the Carnegie Endowment for International Peace by James Brown Scott, Secretary and Director of the Division of International Law, describing the personnel, proceedings and conclusions of the advisory committee of jurists invited by the Council of the League of Nations to prepare a plan for a permanent Court of International Justice.

After an account of the members and the proceedings, we have the text of the project finally adopted, with comments; the resolutions of the committee; the French and English texts of the project and resolutions; the Covenant of the League of Nations, and, in the appendix, the text of various recent projects for a court of international justice. The student has thus, in easily accessible form, the materials necessary for a study of the subject.

The work which Mr. Scott here has undertaken requires no originality or display of literary workmanship, and calls for no criticism except perhaps the remark that some of the comments on the text seem somewhat unnecessary. The chief interest lies in the work of the committee. These learned men met at the Hague during the months of June and July of 1920, and too much cannot be said in praise of their self-denying efforts in the cause of international peace, and, if the work they have done fails, it will fail not because of any omission on their part but because of circumstances over which they had no control, and which circumstances are, in brief, the present undeveloped state of the society composed of the independent states of the world, a society which has as yet developed no political power nor any means of exercising such power even if it were in existence. An effective court of justice is necessarily based on the presence of sufficient political power to enforce its decrees. It appears that one of the principal points of difficulty was whether the jurisdiction of the court should be compulsory and that the compulsory features of the plan adopted were discarded by the Assembly of the League of Nations in subsequent session at Geneva. It is clear, however, that a compulsory provision for compulsory jurisdiction will be fruitless in the absence of any power to enforce it, and that discussion over whether such a provision shall be inserted is, after all, purely academic except in so far as such a provision may be in the nature of a seed from which a compulsory jurisdiction may come into being in the future.

The other principal difficulty lies in the manner of appointing the judges. In this respect the committee did the best they could under the present circumstances. The ideal court will undoubtedly consist of judges appointed for life and giving their entire time to the business of the court. The appointing power